85-1611

No. _____

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROGER ARNEBERGH,

Petitioner,

vs.

E. F. HUTTON & COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARCUS CRAHAN, JR.
CRAHAN, SCOTT, JAVELERA
& VER HALEN
ROGER ARNEBERGH
707 Wilshire Boulevard
Suite 400
Los Angeles, California 90017
(213) 628-1248

Attorneys for Petitioner

---

132 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. In litigation where two separate damage suits have been consolidated for jury trial; the trial has been completed; the jury has returned its two separate verdicts, each for specified dollar amounts; the verdicts have been accepted without question or objection; the jury polled; and the jury discharged:

a. Is it constitutionally permissible, five weeks thereafter and over the repeated objections of petitioner, for a District Court to recall and examine the former jurors for the purpose of having them

explain what they intended by their verdicts? and

b. Is it constitutionally permissible for a District Court to thereafter enter judgment for double the amount of the jury verdict in one case, and to enter judgment in the other case exactly in accordance with the jury verdict?

2. Is a jury verdict for a specified dollar amount fatally "ambiguous" because it does not also expressly set forth how the dollars awarded by the verdict are to be allocated; that is, is a jury verdict for $168,307 in favor of a

plaintiff and against a defendant "ambiguous" because, as held by the Court of Appeals, "The verdict simply did not explain how the balance in the account was to be treated?"

3. If the Court should find that the verdict was ambiguous, what is the appropriate remedy, ordering a new trial or entering a judgment contrary to the verdict as originally rendered?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
BASIS FOR FEDERAL JURISDICTION BELOW	18
REASONS FOR GRANTING THE WRIT	18
ARGUMENT	23
I. THE DISTRICT COURT DEPRIVED PETITIONER OF HIS RIGHT TO JURY TRIAL	23
A. The Post-Trial Jury Examination Was Conducted For An Improper Purpose	23
B. The Verdicts Were Not Inconsistent or Ambiguous	26
C. There Was No Clerical Error	30

TABLE OF CONTENTS

Page

D. The Former Jurors Had Been Tainted By Contacts By Respondent's Counsel . . 33

E. The Post-Trial Jury Examination Was Improperly Conducted . . 35

F. The District Court Failed To Carry Out What The Former Jurors Told It . . 36

G. The District Court Improperly Doubled The Amount of Damages The Jury Had Awarded Respondent 37

H. Petitioner Was Not Guilty Of Waiver 38

II. THE DISTRICT COURT'S CONDUCT VIOLATED RULE 606(b) OF THE FEDERAL RULES OF EVIDENCE . 39

III. SEVENTH AMENDMENT JURY TRIAL RIGHTS SHOULD NOT BE ABRIDGED UNDER THE GUISE OF CORRECTING ALLEGED AMBIGUITY OR CLERICAL ERROR IN JURY VERDICTS . . . 41

CONCLUSION 45

TABLE OF AUTHORITIES

Page

Atlantic & Gulf Stevedore, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, [1962] . 29

Allied Materials Corp. v. Superior Products Co., 620 Fed.2d 224 [10th Cir. 1980] . 43

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935) 19

Beacon Theaters, Inc. v. Westover, 359 U.S. 500 [1959] 22

Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 Fed.2d 224 (D.C., Cir., 1942) 25

Dimick v. Schiedt, 293 U.S. 474, (1935) 19, 22, 38

Dunn v. United States, 284 U.S. 390, (1932) . . . 20, 24, 28, 41

Fox v. U.S., 417 F.2d 84 (5th Cir. 1969) 42

Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963) 21, 29

E. F. Hutton & Co., Inc. v. Arnebergh, 775 Fed.2d 1061 (9th Cir. 1985) . . 1, 7, 11, 27, 30, 32, 33, 37, 38, 40, 42

TABLE OF AUTHORITIES

Page

Hyde v. U.S., 225 U.S. 347 (1912) 20, 24

Koenig v. Frank's Plastering Co., 227 Fed.Supp. 849 (D.C. Neb. 1964) affd. 341 Fed.2d (8th Cir. 1964) 28

Krause v. Rhodes, 520 Fed.2d 563 (6th Cir. 1977) cert. den. 435 U.S. 924 34

McDonald v. Pless, 238 U.S. 264 (1915) 20, 24, 41

Mount Airy Lodge, Inc. v. UpJohn Co., 96 F.R.D. 378 (E.D. Pa. 1982) 44

Myrtle v. Checker Taxi Co., 279 F.2d 930 (7th Cir. 1960) . . 42

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 22

People v. Romero, 31 Cal.3d 685, 646 Pac.2d 824 (1982) . . 25, 41

Remmer v. United States, 347 U.S. 227 (1954) 34

Rushen v. Spain, 464 U.S. 114 (1983) 46

Stein v. New York, 346 U.S. 156 (1983) 24, 46

TABLE OF AUTHORITIES

Page

Traver v. Meshriy, 627 Fed.2d 934 (9th Cir. 1980) 41

United States v. Chereton, 309 Fed.2d 197 (6th Cir. 1967) . 25

United States v. Love, 597 Fed.2d 81 (6th Cir. 1979) . . 42

United States v. Powell, 469 U.S. ___, 83 L.Ed.2d 461 (1984) 21, 28

University Computing Co. v. Lykes-Youngstown Corp., 504 Fed.2d 518 (5th Cir. 1974) . . 43

Woodworkers Tool Works v. Byrne, 191 Fed.2d 667 (9th Cir. 1951) 43

U.S. CONSTITUTION

Seventh Amendment 7, 19

STATUTES

7 U.S.C. 2 et seq. 18
28 U.S.C. §1254(1) 3
28 U.S.C. §1331 18
28 U.S.C. §1332 18
28 U.S.C. §1337 18

STATUTES

Page

Federal Rules of Evidence
Rule 606(b) 3, 20, 40, 41, 46

Federal Rules of Civil Procedure
Rule 49(b) 30
Rule 59(d) 30
Rule 60(a) 16, 43

RULES

Rule 17, Rules of Supreme Court of the United States 18

TEXTS

11 Wright & Miller, Federal Practice and Procedure, §2816, p. 107 . . . . . 20, 38

No. 85.....

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1985

ROGER ARNEBERGH
Petitioner,

vs.

E.F. HUTTON & COMPANY, INC.
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is published as E.F. Hutton & Co., Inc. v. Arnebergh, 775 Fed.2d 1061 (1985), and appears in the Appendix at page A-1. The Order amending that Opinion and denying

rehearing and hearing en banc is included therein, and appears in the Appendix at page A-22. The Order Re Entry of Judgment, and the Judgment on General and Special Verdicts of the District Court were not published. They appear in the Appendix at pages A-29 and A-24, respectively. The verdicts rendered in the District Court were likewise not published. The Special Verdict In Favor of Roger Arnebergh appears in the Appendix at page A-36, and the Verdict In Favor of E.F. Hutton appears in the Appendix at page A-56. The District Court's Order Denying Motion for Judgment Notwithstanding the Verdict Or For New Trial and Denying Motion To Alter Or Amend The Judgment Or For New Trial likewise was not published but appears in the Appendix at page A-58.

JURISDICTION

The Opinion of the Court of Appeals was filed November 5, 1985; and a timely Petition For Rehearing, together with a Request For Hearing En Banc, was denied by Order filed January 23, 1986. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 606(b) of the Federal Rules of Evidence provides:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

STATEMENT OF THE CASE

This litigation resulted from transactions handled by respondent for petitioner which resulted in a loss of $522,764 on five commodity silver future contracts, and a loss of $3,692 on the sale of 5,282 ounces of silver, making a total loss of $526,456 not including any interest.

Petitioner filed an action against respondent in the Superior Court of Los Angeles County on May 20, 1980. Respondent filed an action against petitioner in the District Court on May 29, 1980. Respondent secured the removal of petitioner's state court action to the District Court (CR 1). The two cases were consolidated for trial only (CR 33).

As the issues to be tried were finally stated in a revised pre-trial conference order (CR 40-41), respondent's action was for the recovery of an alleged deficiency existing in petitioner's commodity account, and for judicial foreclosure of a deed of trust against petitioner's real estate. Petitioner's action was for recovery of damages for respondent's alleged breach of contract, negligence, fraud, conversion and violation of federal commodities law with

respect to certain silver commodities transactions, and for cancellation of the promissory note and deed of trust sued on by respondent.

At the outset of the trial, and in order to expedite the trial, the parties stipulated that respondent had a claim against petitioner in the total amount of $336,614; that petitioner had several claims and defenses against respondent; and that if petitioner did not prove any of his claims or defenses, respondent was entitled to recover judgment against him in that amount. (RT 12). That stipulation became a part of the District Court's jury instruction no. 16. (CR 72) That sum was made up of $267,507 principal, and $69,107 interest. (Ex. 72, 6-30-80 statement). 1/

Petitioner's complaint sought recovery of the sum of $522,764.

Petitioner established that his out of pocket losses amounted to $330,912, calculated as follows: $151,578 on hand in his commodity account when he purchased the five December silver futures contracts (Ex. 72, 3-31-80 statement); plus $77,389 of warehouse silver (Ex. 14); plus $101,945 in money transferred from his stock and money market accounts at respondent. (Ex. 72, 3-31-80 statement).

On February 8, 1983, after eight days of jury trial, the jury returned verdicts on each of the two cases.

In the case of Arnebergh v. Hutton, the jury, in a special verdict, found: (1) that respondent breached an express

---

1/ The statement in the majority opinion below that "The parties stipulated that Arnebergh owed Hutton an account balance of $336,614" (755 Fed.2d 1062) misstates the record.

contract with petitioner, and petitioner was damaged as a result of that breach; (2) respondent breached the implied covenant of good faith and fair dealing, and petitioner was damaged as a result of that breach; (3) respondent acted negligently, and petitioner was damaged as a result of such negligence; (4) petitioner was also negligent, and his negligence contributed to his injury; (5) of the combined negligence of the parties, 50% was attributable to petitioner and 50% was attributable to respondent; (6) respondent converted petitioner's property, and petitioner was damaged by such conversion; and (7) respondent had obtained the deed of trust from petitioner by fraud. (App. A-36 and RT 1184-1190).

Based on such findings the jury, in the case of Arnebergh v. Hutton, awarded

petitioner $168,307 in compensatory damages and $100,000 punitive damages (App. A-36).

Respondent did not contest the sufficiency of the evidence to support the jury findings, and did not contest the award of compensatory damages. Respondent did contest the punitive damage award.

In the case of Hutton v. Arnebergh, the jury awarded respondent $168,307 (App.A-56). This award was exactly 50% of the stipulated amount of the account deficiency, and is consistent with the finding that 50% of the negligence was attributable to respondent.

The jury was polled at the request of respondent's counsel (RT 1190-1191).

Neither the parties nor the District Court questioned or objected to either of the jury verdicts. Both verdicts were

accepted, and the jury was discharged (RT 1191 - CR 77).

Thereafter, one of respondent's attorneys contacted three of the six former jurors for the purpose (in his words) "of ascertaining the 'true' meaning of their verdict." (CR 82).

Because one of the jurors complained about the contact, the District Court issued an order to show cause re jury interviews requiring respondent's attorney to explain his conduct, and to show cause why he should not be required to desist from further jury contact. (CR 80).

Respondent then associated his present counsel.

The District Court conducted its order to show cause "hearing" in chambers. (RT 1195-1196).

Strangely, instead of censuring

respondent's attorney for harassing the former jurors, the District Court, in direct conflict with the cases cited in its own order to show cause, decided to examine the former jurors to ask what they meant by their verdicts, both of which were for a specified amount of dollars and were clear and consistent.

Petitioner vigorously objected to the position taken by the court (CR 83); but agreed that if any such examination were to be conducted over his objection, it should be conducted by the court in camera. (CR 85). 2/

On March 15, 1983, over petitioner's written and oral objections, the District

---

2/ The majority below construed this as a waiver by petitioner of his right to challenge the post-trial jury examination (775 Fed.2d 1064). As will be shown in Point I H below, that conclusion is erroneous, as the minority below acknowledges (775 Fed.2d 1065, fn.1).

Court examined the former jurors. (RT 1197-1206, and CR 90). The District Court began the examination by telling the former jurors that its purpose was "to assist the court in understanding the meaning of the verdicts that you rendered on February 8." (RT 1199). The court then erroneously advised the former jurors that counsel for both parties desired the meeting in order "to make inquiry to determine what the correct interpretation of your verdict was." (RT 1199). That was simply untrue, as petitioner's counsel had objected to the post-trial examination of the former jurors at the in-chambers hearing of the order to show cause as well as by written objections filed with the court before the jury examination (CR 83), and in the stipulation for examination itself. (CR 85). In fact, the District Court

acknowledged this when it made its order re entry of judgment. (App. A-31-32).

At the post-trial examination of the former jurors the District Court repeatedly referred to the account deficiency involved in the case of Hutton v. Arnebergh, but made no mention of Arnebergh's loss of $330,912 involved in the case of Arnebergh v. Hutton.

The Court then sent the former jurors out to deliberate. In less than five minutes, they returned and the following colloquy took place:

> "The Court: Okay. For the record then, number one, as I described it, was that Roger Arnebergh was to pay one half of his account deficiency, and E. F. Hutton was to absorb the other half."
>
> "Juror Anderson: Yes...Because we worked on a 50-50 basis pretty much."
>
> "The Court: ...Again, in summation your verdict is that Roger Arnebergh owes E.F. Hutton the $168,307 and

E.F. Hutton absorbs the other half, that is, $168,307." (RT 1204).

"Your verdict," of course, was in the case of Hutton v. Arnebergh. This is exactly what the jury verdict in that case accomplished. It required Arnebergh to pay Hutton $168,307, exactly one half of the account deficiency. The other half was to be absorbed by Hutton (App. A-56).

The verdict in the case of Hutton v. Arnebergh did not in any way involve the jury award to Arnebergh in his case against respondent. The award in that case was based on Arnebergh's loss of $332,912 and the jury findings that Arnebergh was damaged by the wrongful acts of respondent (App. A-36).

Thereafter in direct conflict with the jury verdict in the case of Hutton v. Arnebergh, and totally disregarding the

former jurors' statements of their intent made at the post-trial examination that petitioner pay respondent $168,307 and that respondent absorb the other half of the account deficiency, the District Court made its order re entry of judgment (App. A-29); and judgment on general and special verdicts, awarding respondent $336,614 (App. A-24). This was double the jury verdict and left no portion of the account deficiency for respondent to absorb. The judgment for responent was for the entire account deficiency.

In the case of Arnebergh v. Hutton, the District Court properly entered judgment in accordance with the jury verdicts.

The doubling of the jury verdict in the case of Hutton v. Arnebergh cannot be sustained by any contention that it was

correcting a clerical error. There was no clerical error or misunderstanding of any kind by the jury, as was proven by the post-trial examination. No motion was made by respondent or the court to correct the verdict for clerical error under Rule 60 (a) of the Federal Rules of Civil Procedure. Further, the District Court did not amend, change or even claim that it was correcting the verdict in any respect.

Instead, the District Court arbitrarily entered judgment for double the jury verdict, which in effect made a gift of $168,307 of petitioner's money to respondent.

Petitioner filed a motion to alter or amend paragraph 1 of the judgment to conform to the verdicts, or, in the alternative, for a new trial in the Hutton v. Arnebergh case (CR 93); and

respondent filed a motion for judgment notwithstanding the verdict, and, alternatively, for a new trial. (CR 92). The District Court denied both motions. (App. A-58).

Thereafter, both petitioner and respondent took appeals from portions of the judgment. Petitioner appealed from paragraph 1 thereof by which the District Court had doubled the amount of compensatory damages the jury had awarded to respondent; and respondent appealed from paragraph 3 thereof which confirmed the jury's award of punitive damages to petitioner. No other portions of the judgment were appealed to or reviewed by the Court of Appeals. As a result, those portions of the judgment awarding $168,307 in compensatory damages to petitioner and voiding the deed of trust are final and unreviewable.

BASIS FOR FEDERAL JURISDICTION BELOW

Petitioner invoked the jurisdiction of the District Court under the following statutes: 28 U.S.C. 1331 (federal question); 28 U.S.C. 1332 (diversity); 28 U.S.C. 1337 (civil action arising under act of Congress); and 7 U.S.C. 2 et. seq. (Commodities Exchange Act). Respondent invoked the jurisdiction of the District Court under 28 U.S.C. 1332 (diversity).

REASONS FOR GRANTING THE WRIT

The Opinion of the Court of Appeals is in conflict with decisions of this Court, and with decisions of other federal Courts of Appeals. It has also sanctioned such a departure from the accepted and usual course of judicial procedure by a District Court, as to come within the provisions of Rule 17 of the Rules of this Court.

1. Five weeks after jury verdicts had been rendered and accepted, and the jury polled and discharged, the District Court re-examined the jury's factual determinations in violation of that part of the Seventh Amendment which provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

2. Apparently as a result of its improper post-trial jury examination, (but disregarding the statements of the former jurors at that examination) the District Court doubled the amount of compensatory damages which the jury had awarded to respondent. This was contrary to the rule of Dimick v. Schiedt, 293 U.S. 474, 486-487 (1935) and its progeny.

(11 Wright & Miller, Federal Practice and Procedure, §2816, p. 107).

3. The District Court reassembled the jury for the sole purpose of ascertaining what the jurors intended by the verdicts they had rendered (RT 1199), contrary to the rules stated by this Court in Hyde v. United States, 225 U.S. 347, 388 (1912), McDonald v. Pless, 238 U.S. 264, 266-268 (1915); and Dunn v. United States, 284 U.S. 390, 393-394 (1932); and contrary to Rule 606(b) of the Federal Rules of Evidence.

4. When the District Court conducted the post-trial jury examination the former jurors had been prejudicially tainted by contacts from respondent's counsel thereby further depriving petitioner of his jury trial rights.

5. The District Court conducted the post-trial jury examination in a pre-

judicial fashion by erroneously stating that counsel for both parties had agreed to the examination, and by focusing on respondent's compensatory damages to the exclusion of petitioner's compensatory damages (RT 1200-1203).

6. Because the jury decided two separate lawsuits which had been consolidated for trial only, the verdicts should have been allowed to stand. The District Court found inconsistency where consistency was not required (United States v. Powell, 469 U.S. ___, 83 L.Ed.2d 461 [1984]; and found ambiguity where none existed, contrary to rules established by this Court in cases such as Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 119 [1963].

7. The District Court even failed to carry out what it found to be the intent of the former jurors, namely:

that "Roger Arnebergh owes E.F. Hutton the $168,307, and E.F. Hutton absorbs th other half, that is, $168,307..." (RT 1204).

8. The conduct of the District Court cannot be saved by the doctrines o waiver or jury error. There was no waiver by petitioner of his right to challenge the post-trial jury examination, or jury error, clerical or otherwise.

Because maintenance of the jury as a fact-finding body is of such importanc and occupies so firm a place in our history and jurisprudence, any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. (Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 [1979], dissenting opinion of Justice Rehnquist, citing Dimick v. Schiedt, supra, and Beacon

Theaters, Inc. v. Westover, 359 U.S. 500, 501 [1959]).

We respectfully submit that if, under the guise of claimed ambiguity or clerical error, a District Court can do what it has done in this case, no jury or verdict will be safe from post-trial attack, and the Seventh Amendment will have been emasculated. Additur and reconvening former jurors for the purpose of examining them as to what they intended by their verdict are prohibited by federal law for that very reason.

Consequently, we request this Court to grant this Petition for Certiorari.

ARGUMENT

I.

THE DISTRICT COURT DEPRIVED PETITIONER OF HIS RIGHT TO JURY TRIAL

A. The Post-Trial Jury Examination Was Conducted For An Improper Purpose.

This court has repeatedly held that jurors cannot be examined, directly or b affidavit, as to the meaning, intent, or manner by which they arrived at their verdict. (Stein v. New York, 346 U.S. 156, 178-79 [1953]; Dunn v. United States, supra, 284 U.S. 390, 392-94 [1932]).

Thus, this Court has held that a juror may not testify directly or by affidavit to establish that a verdict wa the result of a compromise (Hyde v. United States, supra, 225 U.S. 347, [1912]), or to establish that a verdict was a quotient verdict. (McDonald v. Pless, supra, 238 U.S. 264 [1915]).

Justice Holmes, speaking for the Court in Dunn, supra, declared the rule as follows:

> "That the verdict may have been the result of compromise, or of a mistake on the part of the jury is

possible. But verdicts cannot be upset by speculation or inquiry into such matters." (284 U.S. 394).

The federal Courts of Appeal have held that jurors cannot establish by testimony or affidavit that there was a mistake in their verdict (United States v. Chereton, 309 Fed.2d 197, 6th Cir., [1967], cert. den., 372 U.S. 936); or to establish what their intent was in rendering a particular verdict. (Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 Fed.2d 224, D.C. Cir., [1942]).

California law is the same, and specifically precludes receipt of evidence that a jury verdict was the result of clerical or deliberation error. (People v. Romero, 31 Cal.3d 685, 689-696; 646 Pac.2d 824 [1982]).

While the foregoing rules do not foreclose testimony by jurors as to prejudicial extraneous information or

influences injected into or brought to bear upon the deliberative process, there never has been any claim in this case that any extraneous prejudicial information was improperly brought to the jury's attention, or that any outside influence was improperly brought to bear upon any juror. The majority below concedes this (755 Fed.2d 1064). Consequently, there was no legal reason whatsoever for any post-trial jury examination to be conducted in this case.

B. The Verdicts Were Not Inconsistent or Ambiguous.

The District Court sought to justify its post-trial jury examination on the basis that, in view of the parties' stipulation with respect to respondent's damage claims, there was an ambiguous inconsistency created between the two compensatory damage awards. The majority

below agreed, while the minority below disagreed.

The majority below held that a verdict for a specified amount of money was "ambiguous" because "it simply does not explain" how the dollars awarded are to be applied (755 Fed.2d 1063). If this is to become the law, as it will if certiorari is not granted, virtually every jury verdict in civil cases will be "ambiguous" as a matter of law, as virtually all jury verdicts are for a specified number of dollars and do not "explain" how the dollars awarded are to be applied.

Since the two lawsuits (Arnebergh v. Hutton and Hutton v. Arnebergh) were separately filed in different courts, and were consolidated for trial only in the District Court, both cases retained their separate and distinct character.

Consequently, there was no requirement whatsoever for consistency in the verdicts, even if the District Court thought that the verdicts were inconsistent. (United States v. Powell supra, 469 U.S. _____, 83 L.Ed.2d 461 [1984]; Dunn v. United States, supra, 2[illegible] U.S. 390 [1932]; and Koenig v. Frank's Plastering Company, 227 Fed.Supp. 849, 852, D.C. Neb. [1964], affd. 341 Fed.2d 257, 8th Cir., [1964]). Both opinions below failed to consider this distinction.

But there was no inconsistency. Each verdict was for a specified dollar amount exactly or approximately one hal[illegible] of the loss sustained by the respective plaintiff in the case in which the applicable verdict was rendered. This was completely consistent with the jury finding that petitioner and respondent

were both negligent and that such negligence was attributable 50% to each. Consequently the jury very properly awarded petitioner approximately 50% of his loss as established in petitioner's case against respondent, and awarded resondent 50% of its loss as established in respondent's case against petitioner.

Even if this were not the case, the verdicts should have been construed so as to be clear and consistent in order to uphold the parties' jury trial rights. (Gallick v. Baltimore & Ohio Railroad Co., supra, 372 U.S. 108, 119 [1963]; and Atlantic & Gulf Stevedore, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 [1962]).

However, if the verdicts were fatally ambiguous, a new trial should have been ordered, particularly here where whatever ambiguity existed was

created by respondent's attorney's post-trial jury contacts (FRCP Rule 49[b]). The majority below agrees (755 Fed.2d 1064), but doesn't so rule becaus it erroneously concludes that neither party sought a new trial. 3/

C. There Was No Clerical Error.

The District Court's post-trial jur examination confirmed that the jury intended to award respondent only $168,307 (RT 1204). So the verdict in that amount was correct as rendered (App A-56).

The whole question of clerical erro was created by respondent on appeal in a

---

3/ Again, the majority below misstates the record. Both parties moved for new trial (CR 92, 93) as clearly evidenced b the District Court's denial of their motions therefor (App. A-58). Of course, the court could have ordered a new trial on its own motion under FRCP Rule 59(d).

attempt to justify the District Court's failure to enter judgment in accordance with the jury's twice expressed verdict. Thus, no one (the parties, the District Court, or any of the jurors) felt there was any error, clerical or otherwise, when the jury verdicts were rendered, the jury was polled, and the jury was thereafter discharged. No motion was made by respondent to correct any clerical error under Federal Rule of Civil Procedure 60(a) even after respondent's attorney had spoken with three of the six former jurors. The District Court itself was unsure whether there was any error in the jury verdicts, as the District Court reassembled the former jurors for the sole purpose "to assist the court in understanding the meaning of the verdicts that you rendered on February 8...to make inquiry to

determine what the correct interpretatic
of your verdict was." (RT 1199).

The minority below found that the original verdict for respondent was unambiguous, but, nevertheless, had to b corrected in the judgment to reflect wha the minority thought the jury intended. The minority reached its conclusion by misconstruing jury instruction 16. Thus the minority erroneously concludes "that the parties had stipulated that Arneberg owed Hutton an account balance of $336,614" and, therefore, the jury must have intended to bring in a verdict in that amount (775 Fed.2d 1065). The minority overlooks the facts (1) that th jury instructions made it clear that Arnebergh would owe Hutton the sum of $336,614 only "if you find that Roger Arnebergh has failed to establish all o the facts necessary to prove any of his

several defenses or claims"; and (2) that the jury had found that Arnebergh had in fact established a considerable number of his defenses and claims, including those for breach of the covenant of good faith and fair dealing, conversion and fraud which the minority fails to mention (App. 37).

The comment by the majority below that "After the verdict came in, each side celebrated independently" (755 Fed.2d 1062) misstates the facts. After the verdicts were rendered respondent's counsel believed he had lost, so he had the jury polled. Winners don't poll juries. Then the same counsel began contacting the jurors. Winners don't do that either.

D. The Former Jurors Had Been Tainted By Contacts By Respondent's Counsel

At the time the District Court engaged in the jury examination, five weeks had elapsed, and three of the six jurors had been contacted by respondent counsel. [4/] Such contact, if it had occurred during the trial, would be deemed to have been presumptively prejudicial (Remmer v. United States, 3 U.S. 227, 229 [1954]; Krause v. Rhodes, 570 Fed.2d 563, 566-569 [6th Cir. 1977] cert. den. 435 U.S. 924); and would hav required respondent to establish that t contact was harmless to petitioner. No such showing was made or attempted. Th fact that the jury contact occurred aft

---

4/ For example, respondent's attorney "told Mrs. Adams [one of the former jurors] that there was some confusion a to what the verdicts meant, and that perhaps the verdicts did not mean what the jury intended" thereby planting a seed of doubt in her mind (CR 82, ¶22, pp. 20-21).

the trial is no less prejudicial in this case because the jury was recalled to re-decide the case.

E. The Post-Trial Jury Examination Was Improperly Conducted.

In conducting the post-trial examination, the District Court erroneously stated that counsel for both parties had agreed to the examination, when the fact was that petitioner's counsel vehemently objected to such an examination. (CR 83). Then, the District Court compounded its error by mentioning only respondent's compensatory damages to the exclusion of petitioner's compensatory damages (RT 1199-1203). The District Court mentioned jury instruction 16 by which the jury was instructed to return a verdict for respondent in the amount of $336,614 if the jury found that Arnebergh had failed to establish any of

its claims or defenses, but that the ju had only returned a verdict in respondent's favor in the amount of $168,307. The District Court did not similarly advise the jury that Arneberg had established losses amounting to $330,912, or go over any of the special verdict findings the jury had made in favor of petitioner which established defenses to respondent's claim. (App. A-36).

While noting that respondent's attorney had contacted some of them (RT 1199), the District Court failed even t inquire as to whether the former jurors had been tainted by that contact.

F. The District Court Failed to Carry Out What the Former Jurc Told It.

The District Court summarized what it understood to be the jurors' intentions as follows: "your verdict is

that Roger Arnebergh owes E.F. Hutton the $168,307, and E.F. Hutton absorbs the other half, that is $168,307; is that correct?" to which all of the jurors replied "That's correct." In fact, one of the jurors, Mr. Anderson, stated "We worked on a 50-50 basis pretty much." (RT 1204-1205).

Nevertheless, the District Court then entered judgment upon jury verdicts doubling the amount of compensatory damages the jury had awarded to respondent from $168,307 to $336,614 (App. A-24).

The conclusion by the majority below that "...the district court did not increase the amount of damages awarded by the jury" (755 Fed.2d 1064) is thus clearly contrary to the record.

G. The District Court Improperly Doubled The Amount of Damages The Jury Had Awarded Respondent.

While a federal court may grant a new trial because the district judge believes the jury's verdict is inadequate, a federal court may not increas the damages above those awarded by a jury, either directly or by the use of additur. In such a case, the District Court must correct the problem by granting a new trial, otherwise one or more of the parties' rights to jury tr is denied. (11 Wright & Miller, Feder Practice and Procedure, §2816, p. 107, citing Dimick v. Schiedt, supra, among other cases.

H. Petitioner Was Not Guilty Of Waiver

As the minority below noted (775 Fed. 1065, fn. 1), nothing is clearer than that petitioner repeatedly objecte to the jury examination. Petitioner d so at the "hearing" on the order to sh

cause re jury interviews; in a lengthy memorandum entitled "Arnebergh's Position With Respect To Jury Interviews; And Objections To Any Jury Interviews Based Thereon" (CR 83); and in the Stipulation For In Camera Examination Of Jurors By Court (CR 85) which commences with the following statement: "Subject to and without waiving in any way the continuing objection of Roger Arnebergh to the receipt of juror testimony..." (CR 85).

Respondent never claimed any waiver by petitioner, and the District Court acknowledged there was none (App. A-31-32). This should end the matter.

The majority below simply misconstrued the uncontradicted facts, and in so doing drew an erroneous conclusion.

II.

THE DISTRICT COURT'S CONDUCT VIOLATED RULE 606(b) OF THE FEDERAL RULES OF EVIDENCE

Rule 606(b) prohibits any and all inquiry into the validity of a verdict except solely with respect to whether an extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror.

No one (the court or the parties or any juror) ever claimed that there was any extraneous prejudicial information improperly brought to the jury's attention, or that any outside influence was improperly brought to bear upon any juror. The majority below concedes this (775 Fed.2d 1064). Therefore, the clear language and intent of Rule 606(b) prohibited the post-trial examination of former jurors which the District Court conducted in this case. In fact, another panel of the same Circuit has held that

similar conduct would violate the Rule. (Traver v. Meshriy, 627 Fed.2d 934, 941 [9th Cir. 1980].

As stated in Point I H above, petitioner did not waive his right to claim a Rule 606(b) violation.

III.

SEVENTH AMENDMENT JURY TRIAL RIGHTS SHOULD NOT BE ABRIDGED UNDER THE GUISE OF CORRECTING ALLEGED AMBIGUITY OR CLERICAL ERROR IN JURY VERDICTS

We recognize that federal law governs this issue. However, we respectfully urge this Court to adopt the reasoning and decision of the California Supreme Court in People v. Romero, supra, 31 Cal.3d 685, 689-696; 646 Pac.2d 824 [1982] on this issue as it is consistent with Rule 606(b) and the public policy rationale expressed by this Court in the cases cited in point I A above such as McDonald v. Pless and Dunn v. United

States, supra.

This is not a case where a jury allowed to correct its own admitted mistake before the verdict is accepte and the jury discharged (United State Love, 597 Fed.2d 81 [6th Cir. 1979]); is not a case where there was no unanimous verdict ever reached. (Fox United States, 417 Fed.2d 84 [5th Cir 1969]).

The clerical error decisions cit by the majority below (775 Fed.2d 106 are inapposite. Myrtle v. Checker Ta Co., 279 Fed.2d 930 [7th Cir. 1960] involved a stipulation by counsel tha jury verdict could be returned in the absence of the court or counsel, and if such were the case, the court woul have the express right to reconvene t jury (which was still being held in t courthouse) to explain the verdicts i

there was any ambiguity. University Computing Co. v. Lykes-Youngstown Corp., 504 Fed.2d 518 [5th Cir. 1974] involved the resubmission of a case to a jury before it had been discharged. Not our case at all. [5/] Woodworkers Tool Works v. Byrne, 191 Fed.2d 667 [9th Cir. 1951] involved the correction of a patent clerical error in the jury verdict which was brought to the attention of the court by a juror affidavit stating that the amounts of the compensatory and special damages had been transposed. A Rule 60(a) motion was brought to correct the stipulated error, and the jury verdict was corrected accordingly. Again, not our case. Allied Materials Corp. v.

[5/] Footnote 43 of University Computing, cited by the majority below as recognizing a clerical error exception to Rule 606(b), really supports our position.

Superior Products Co., 620 Fed.2d 224 [10th Cir. 1980] involved a court, rat than a jury trial. In announcing its decision orally from the bench the cou made an error by misstating the award being $1,200 when it meant $12,000. T court quickly realized its mistake and before a judgment was entered, correct itself. Again, not our case at all. Mount Airy Lodge, Inc. v. UpJohn Co., F.R.D. 378 [E.D. Pa. 1982] comes close to what the District Court did in this case, and shows what federal district judges throughout the nation may do unless the issues presented by this petition are determined by this court. In Mount Airy a district judge decided interrogate two jurors and the foreman a nine person jury in order to determi whether to recall the entire jury for examination or to grant a new trial ev

though he agreed that the verdicts can be construed as not being inconsistent.

CONCLUSION

We respectfully submit that petitioner has suffered a grievous denial of his jury trial rights. Moreover, the published Opinion of the Court of Appeals sets a dangerous precedent (albeit on a misstatement of the record) whereby the jury trial rights of other civil litigants may be likewise substantially abridged under the guise of correcting an alleged ambiguity or clerical error in jury verdicts.

If Certiorari is not granted, district judges throughout the federal system will be able to rely on that precedent to allow them (1) to arbitrarily increase the amount of damages awarded by a jury; (2) to recall and examine juries long after they have

been discharged, without any of the causes specified in Rule 606(b), simpl to inquire as to what the jury intende and (3) to consider a jury verdict for specific amount of damages to be fatal ambiguous unless the jury also specifi how the damages are to be allocated or applied.

If that is to be the law, we respectfully submit that it should be declared by this Court, not by a Distr Court or a Court of Appeals.

This Court has not spoken on the jury examination issues raised by this case since Stein v. New York, supra, i 1953.

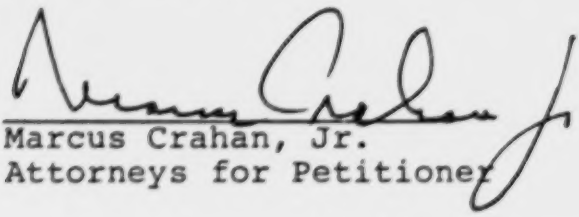
Moreover, except in a passing footnote in Rushen v. Spain, 464 U.S. 114, 120 fn. 5 (1983), this Court has yet interpreted Rule 606(b) of the Federal Rules of Evidence.

Therefore, we respectfully submit that this case presents substantial constitutional questions which are ripe for decision by this Court, and, as such, Certiorari should be granted and the District Court ordered to enter judgment in accordance with the jury's verdicts.

Dated March 24, 1986

Respectfully submitted,

Marcus Crahan, Jr.
CRAHAN, SCOTT, JAVELERA
& VER HALEN
Roger Arnebergh

by 
Marcus Crahan, Jr.
Attorneys for Petitioner

APPENDIX

No. 85.....

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

ROGER ARNEBERGH
Petitioner,

vs.

E.F. HUTTON & COMPANY, INC.
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Marcus Crahan, Jr.
CRAHAN, SCOTT, JAVELERA
& VER HALEN
Roger Arnebergh
707 Wilshire Blvd., Ste. 400
Los Angeles, California 90017
(213) 628-1248
Attorneys for Petitioner

APPENDIX

TABLE OF CONTENTS

Opinion of the U.S. Court of Appeals for the Ninth Circuit, filed Nov. 5, 1985 and published in 775 Fed.2d 1061 . . . . . A-1

Order of the U.S. Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Hearing En Banc, filed Jan. 23, 1986 . . . . . A-22

Judgment on General and Special Verdicts, filed Mar. 23, 1983 . . . . . A-24

Order Re Entry of Judgment, filed Mar. 23, 1983 . . . . . A-29

Special Verdict In Favor of Roger Arnebergh, rendered Feb. 8, 1983 . . . . . A-36

Verdict In Favor of E.F. Hutton & Company, Inc., rendered Feb. 8, 1983 . . . . A-56

Order Denying Motion For Judgment Notwithstanding The Verdict Or For New Trial And Denying Motion To Alter Or Amend The Judgment Or For New Trial, filed Jul. 29, 1983 . . A-58

FOR PUBLICATION

FILED
NOV 5, 1985
CLERK, U.S.
COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. F. HUTTON & CO., INC.
Plaintiff-Appellee-Cross-Appellant,
vs.
ROGER ARNEBERGH,
Defendant-Appellant-Cross-Appellee.

Nos. 83-6195/6222
D.C. #CV-80-2273-MML

Appeal from the United States District Court for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
Argued and submitted February 8, 1985 - Pasadena, California

Before: SCHROEDER, FLETCHER and FARRIS, Circuit Judges.

SCHROEDER, Circuit Judge.

OPINION

These appeals stem from a sharply contested dispute, involving silver futures contracts, between a broker, E. F. Hutton & Co., Inc. ("Hutton"), and one

of its customers, Roger Arnebergh. The jury rendered a verdict awarding damage to both sides. However, because of a lack of clarity in the verdict forms, t verdict was ambiguous and each side cou interpret it as a net victory. That is what happened. Unfortunately, the ambiguity did not become apparent to th district court until several weeks afte it had polled and discharged the jury.

How this confusion arose is worth relating in some detail. Hutton sued Arnebergh for the balance due in his account, and Arnebergh sued Hutton for breach of contract, negligence and conversion. The cases were consolidate for jury trial. The parties stipulated that Arnebergh owed Hutton an account balance of $336,614. Hutton requested that the jury verdict form include the fact that the parties had stipulated to

that amount, but such a statement was omitted on the objection of Arnebergh. The jury was given a special verdict form as to Arnebergh's claims against Hutton and a general verdict form as to Hutton's claims against Arnebergh. The jury found in favor of Arnebergh on his contractual and conversion claims and found that Arnebergh and Hutton had been equally negligent in connection with Arnebergh's losses on one set of silver contracts. The jury awarded compensatory damages of $168,307 to both Hutton and Arnebergh. The amount was exactly half the stipulated debt balance in Arnebergh's account. The jury also awarded Arnebergh $100,000 in punitive damages. After the verdict came in, each side celebrated independently.

The problem with the verdict was that the forms did not provide a way for

the jury to explain how it was dealing with the stipulated debt balance. Whe the verdict is read in the light of th balance, one cannot tell from the face the forms which of the two possibiliti was intended. One possibility, urged Arnebergh, was that the two compensato damage awards were to cancel each othe out, leaving Arnebergh owing nothing t Hutton on his account and netting him $100,000 punitive damage award. The other, urged by Hutton, was that the j intended that Arnebergh would pay Hutt one-half of the account balance and th Hutton would absorb the other half. T would result, after set off of the punitive damage award, in Arnebergh ow Hutton $68,307. The only certainty ab the verdict was its uncertainty.

The first indication the district court had that something was amiss was

call from a juror, about ten days after the jury had been discharged but before any judgment had been entered. The juror advised the court that Hutton's counsel had contacted the juror about the case. The court promptly and correctly scheduled an Order to Show Cause hearing regarding the jury contacts. It was at that hearing that the parties disagreed over the meaning of the verdict and that the court perceived the ambiguity.

Hutton took the position at the hearing that the district court should recall the jury and inquire which meaning it intended. Arnebergh opposed interviewing the jury because he took the position that the verdict was unambiguous and that the court should enter judgment in accordance with Arnebergh's reading of it. Arnebergh was concerned, furthermore, that Hutton's ex parte contact with

the jurors and the five week span of t
since discharge would taint any recon-
vention. Though Arnebergh preserved h
position for appeal that any action
beside entry of judgment as he inter-
preted it was error, he stipulated,
subject to that reservation, that the
jury could be interviewed in camera.
judge then reconvened the jury, explai
the problem and asked the jury to advi
which result it intended.

The jurors retired, discussed the
matter for less than five minutes, and
returned to inform the court that they
had intended the meaning urged by Hutt
The court then entered a judgment
reflecting a net compensatory damage
award of $168,307 to Hutton and awardi
Arnebergh $100,000 in punitive damages
Both sides filed timely appeals.
Arnebergh, in his appeal, asks that th

judgment be reversed and a new judgment be entered awarding him net damages of $100,000. In the alternative, he asks that the district court's judgment be affirmed to the extent it awarded him $168,307 in compensatory damages and $100,000 in punitive damages and that there should be a new trial limited to Hutton's claim of $336,614 against him.

The threshold issue in Arnebergh's appeal from the award of compensatory damages is whether Arnebergh is correct in his assertion here, and before the district court, that the verdict was unambiguous and that judgment should have been entered with offsetting compensatory damage amounts for each side. We agree with the district court's conclusion that the verdict was ambiguous, and that it should not have entered judgment as requested by Arnebergh. The verdict

simply did not explain how the balanc
the account was to be treated. In th
circumstances, the district court
correctly declined to enter judgment
the basis of an ambiguous verdict. C
5A J. Moore & J. Lucas, Moore's Feder
Practice, ¶49.04, at 49-44 & n.15 (2d
1985) and 6A J. Moore, J. Lucas & G.
Grotheer, Jr., Moore's Federal Practi
¶ 59.08[4], at 59-128 & n. 70 (2d ed.
1984) (court should refrain from ente
judgment if jury's special verdicts a
inconsistent either with each other o
the general verdict; jury should be
instructed to deliberate further or a
trial ordered). This situation can b
best analogized to an inconsistent
verdict. Cf. Dickerson v. Pritchard,
F.2d 256, 258-59 (8th Cir. 1983); Row
International, Inc. v. J-B Enterprise
647 F.2d 830, 335 (8th Cir. 1981).

From our holding that the district court acted correctly in refusing to enter the ambiguous judgment, it does not necessarily follow that the court acted in accordance with applicable rules in reconvening the jury, five weeks after it was discharged, to interview it about the verdict. Fed. R. Evid. 606(b) forbids the receipt of juror testimony concerning matters occurring during the course of deliberations or concerning the jury's reasoning process in reaching a verdict. 1/ Traver v. Meshring, 627 F.2d 934, 941 (9th Cir. 1980). The only exceptions the rule expressly creates are with respect to juror testimony concerning whether the verdict was affected by "extraneous prejudicial information" or "any outside influence." Fed. R. Evid. 606(b). These circumstances were not present here. Hutton, however, argues that there is an

additional exception for clarificati
"clerical errors" within which this
falls. See, e.g., Woodworkers Tool
v. Byrne, 191 F.2d 667, 676 (9th Cir.
1951); Allied Materials Corp. v. Supe
Products Co., 620 F.2d 224, 225-26 (
Cir. 1980); Myrtle v. Checker Taxi Co
279 F.2d 930, 934 (7th Cir. 1960); Mc
Airy Lodge, Inc. v. Upjohn Co., 96 F.
378, 381 (E.D. Pa. 1982); cf. Univers
Computing Co. v. Lykes-Youngstown Cor
504 F.2d 518, 547 n.43 (5th Cir. 1974
(clerical error exception recognized
dicta). But see People v. Romeo, 31
3d 685, 646 P.2d 824, 828-30, 183 Cal
Rptr. 663 (Cal. 1982). See generally
J. Weinstein & M. Berger, Weinstein's
Evidence ¶ 606[04] at 606-32 & n.38
& Supp. 1984); Annot., 18 A.L.R. 3d
(1968).

We do not need to reach that issue in this case, however, because both sides, for reasons which are understandable, preferred to have the district court question the jury rather than to risk the consequences of a new trial. If a Rule 606(b) violation had occurred when the court reconvened the jury weeks after discharge to clarify the ambiguous verdict, and if either party had asked for a new trial, the district court may well have been required to order one. Cf. Malley-Duff & Associates v. Crown Life Insurance Co., 734 F.2d 133, 144-47 (3d Cir. 1984) (inconsistent verdict requires granting of new trial); Hopkins v. Coen, 431 F.2d 1055, 1059 (6th Cir. 1970) (when verdicts are inconsistent, a new trial must be granted); 5A J. Moore & J. Lucas, supra, ¶ 49.04 at 49-44 & n.15 and 6A J. Moore, J. Lucas &

G. Grotheer, Jr., supra, ¶ 59.08[4], 59-128 & n.70 (new trial granted if jury's verdict is inconsistent or confused).

Arnebergh, however, did not move a new trial of all claims. He stipul to the procedure used subject to his objections to the court's finding of ambiguity in the verdict and its refu to enter judgment awarding him net damages of $100,000. Since we agree the district court that the verdict w ambiguous, and he was not entitled to entry of such a judgment, we do not n to decide whether Rule 606(b) was violated. No reversible error occurr See Rowe International, Inc., 647 F.2 835 (court did not err in sending jur back for further deliberation after j returned inconsistent verdicts since parties consented to procedure).

The remaining issues can be dealt with more summarily. Arnebergh contends tnat the district court misled the jurors during its post-trial interview. We have reviewed the transcript and find that the interview was both fair and well within the scope of the parties's stipulation as to the court's discretion in presenting the matter to the jury.

Arnebergh also contends that the court increased the amount of damages awarded by the jury to Hutton. Arnebergh relies on the principle that a court cannot increase the amount of a jury verdict it finds to be inadequate but must instead order a new trial. See, e.g., DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 837-838 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964). Here, however, the district court did not increase the amount of damages awarded by

the jury. It entered a judgment whic conformed to what the jury said it ha intended.

In view of our resolution of Arnebergh's appeal, he is not entitle costs and attorney's fees.

In its appeal, Hutton challenges district court's instruction to the j that it could award punitive damages Arnebergh under his claims that Hutto breached its implied covenant of good faith and fair dealing. The district court did not err in this regard. Wh the issue was at the time uncertain i California, the court had authority o which to base its instruction. See Smithers v. MGM, 139 Cal.App. 3d 643, Cal.Rptr. 20 (1983). Moreover, any e was harmless because the award of punitive damages could have been base other theories. See Seaman's Direct

Buying Service, Inc. v. Standard Oil of Calif., 36 Cal. 3d 752, 770, 686 P.2d 1158, 1168, 206 Cal. Rptr. 354 (1984) (judgment reversed for erroneous jury instructions only when a reasonable probability exists that a result more favorable to the appealing party would have been reached in the absence of the error).

The judgment of the district court is affirmed and each party is to bear its own costs.

FOOTNOTE

1/ Fed. R. Evid. 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether

extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

FILED
NOV 5, 1985
CLERK,
U.S. COURT OF APPEALS

E. F. HUTTON v. ARNEBERGH, No. 83-6195

FLETCHER, Circuit Judge, Concurring:

I concur in the decision to affirm the district court's judgment. However, because I conclude that the jury's original verdict was unambiguous and was consistent with the district court's ultimate judgment, I find it unnecessary to reach the issues discussed by the majority.

The court instructed the jury that the parties had stipulated that Arnebergh owed Hutton an account balance of $336,614. The court's instructions provided that: "If you find that Roger Arnebergh has failed to establish all of the facts necessary to prove any of his several defenses or claims by a

preponderance of the evidence, then you should render your verdict for that amount [$336,614] against the defendant Roger Arnebergh."

In its special verdict, the jury found that Hutton had breached the implied covenant of good faith and fair dealing in connection with Arnebergh's silver futures contracts, but not with his spot silver contracts. It explicitly found that 50% of the parties' combined negligence in their transactions was attributable to Hutton, and 50% was attributable to Arnebergh.

In light of the instructions the jury was given and the answers it provided on the special verdict form, the jury's original verdict made sense only as embodied in the district court's judgment. The jury awarded an identical amount of compensatory damages, $168,30

to Hutton and Arnebergh; this amount was exactly one-half of the stipulated account balance. Arnebergh maintains that the jury's intent was for the two compensatory damage awards to cancel one another out, and for Arnebergh to be left with the $100,000 punitive-damage award owed by Hutton. Yet such a verdict would have left Hutton recovering nothing out of Arnebergh's $336,614 account balance, despite the jury's conclusion that Hutton had breached its contractual duties in only one out of the two sets of contracts between the parties, and that Arnebergh was 50% responsible for the parties' combined negligence.

The only possible interpretation of the jury's verdict that is consistent with the facts of this case and the answers provided on the special verdict form is that the jury intended to "split

the difference" on Arnebergh's outstanding account balance, awarding Arnebergh a $168,307 reduction in the amount he owed to Hutton, and awardin Hutton a $168,307 net recovery from Arnebergh. The punitive damages were be subtracted from Hutton's net recov

The trial judge should not have found it necessary to reconvene or question the jury. The fact that he so and the jury required less than fi minutes to confirm the meaning of its original verdict demonstrates how unambiguous that verdict was.

I therefore agree that the distr court's judgment should be affirmed.[1]

[1] I do not agree, however, with the majority's conclusion that Arnebergh waived his right to challenge the district court's decision to reconven the jury under Federal Rule of Eviden 606(b). Arnebergh explicitly preserv two objections to the jury interview his pleading of March 1, 1983 and the parties' stipulation of March 2, 1983

(1) that the original verdict unambiguously indicated that he was entitled to a net recovery of $100,000; and (2) that any interview of the jury would violate Rule 606(b). I do not agree with the majority that Arnebergh somehow waived his Rule 606(b) objection because he failed to move for a new trial.

FOR PUBLICATION

FILED
JAN 23, 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. F. HUTTON & COMPANY, INC.,
Appellee and Cross-Appellant,
vs.
ROGER ARNEBERGH,
Appellant and Cross-Appellee.

Nos. 83-6195/6222
D.C. #CV-80-2273-MML

Before: SCHROEDER, FLETCHER and FARRIS, Circuit Judges.

ORDER

The majority opinion in this case, filed November 5, 1985, 775 F.2d 1061 (9th Cir. 1985), is amended accordingly:

On page 1065, first column, the sentences beginning at line 9 with the words "Moreover, any" and ending with "the error" should be omitted.

The panel as constituted above has voted to deny the petition for rehearing

and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
MAR 23, 1983
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E. F. HUTTON & COMPANY, INC., etc. Plaintiff, v. ROGER ARNEBERGH, et al., Defendants.	No. CV-80-2273-MML CV-80-2721-MML JUDGMENT ON GENERAL AND SPECIAL VERDICTS
ROGER ARNEBERGH, Plaintiff, v. E.F. HUTTON & COMPANY, etc., Defendants.	

These actions came on regularly for consolidated trial by jury on January 25, 1983. E.F. Hutton & Co., Inc., Leonard Robbins and Robert Weinman were repre-

sented by Jones, Bell, Simpson & Abbot, by C. Edward Simpson, and Kevin McKay. Roger Arnebergh was represented by Marcus Crahan, Jr. and Roger Arnebergh. A jury was impaneled and sworn. Witnesses testified, documentary exhibits were received and the matter was argued to the jury by counsel. After being instructed by the court the jury deliberated and returned a general verdict in favor of E.F. Hutton & Co., Inc. and a special verdict in favor of Roger Arnebergh. Both verdicts were filed on February 8, 1983.

In accordance with these verdicts and in consideration of the matters discussed in the Order re Entry of Judgment filed concurrently herewith the Court hereby orders, adjudges, and decrees that

(1) E.F. Hutton & Co., Inc. shall have and recover from Roger Arnebergh the sum of $336,614.11 as compensatory damages in full and complete satisfaction of all of its claims against Roger Arnebergh;

(2) Roger Arnebergh shall have and recover of E.F. Hutton & Co., Inc., Leonard Robbins, and Robert Weinman jointly and severally the sum of $168,307 in compensatory damages in full and complete satisfaction of all of his claims against them;

(3) Roger Arnebergh shall have and recover of E.F. Hutton & Co., Inc., the sum of $100,000 as punitive damages;

(4) Both E.F. Hutton & Co., Inc. and Roger Arnebergh shall recover post judgment interest on the amounts due and owing to them in accordance with the provisions of 28 U.S.C. §1961;

(5) That certain deed of trust of April 8, 1980 executed by Roger Arnebergh and Emilie K. Arnebergh in favor of E.F. Hutton & Co., Inc., and recorded on April 8, 1980 in the official records of the Office of the Los Angeles County Recorder is hereby voided. E.F. Hutton & Co., Inc. shall therefore, cause the property covered by said deed of trust to be reconveyed to Roger Arnebergh and Emilie K. Arnebergh; and

(6) E.F. Hutton & Co., Inc. shall take nothing from Emilie K. Arnebergh and its complaint against her shall be and hereby is dismissed with prejudice.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Judgment on counsel for the parties in this matter.

Dated: March 23, 1983

Malcolm M. Lucas
United States District Judge

FILED
MAR 23, 1983
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E. F. HUTTON & COMPANY, INC., etc. Plaintiff, v. ROGER ARNEBERGH, et al., Defendants.	No. CV-80-2273-MML CV-80-2721-MML ORDER RE ENTRY OF JUDGMENT
ROGER ARNEBERGH, Plaintiff, v. E. F. HUTTON & COMPANY, etc., Defendants.	

Consolidated trial of the above captioned cases was begun on January 25, 1983. On February 8, 1983 the jury returned a general verdict in favor of

E.F. Hutton & Company, Inc. ("Hutton") and against Roger Arnebergh ("Arnebergh") in the amount of $168,307. The jury also returned a special verdict in favor or Arnebergh in the amount of $168,307. In this verdict the jury also awarded punitive damages in favor of Arnebergh and against Hutton in the amount of $100,000.

Following the return of the verdicts, Arnebergh filed an application for entry of judgment contending, in part, that "the net effect of the two verdicts is that Mr. Arnebergh is to receive $100,000 from E.F. Hutton." (See Application for Entry of Judgment filed on February 11, 1983, at page 3, lines 5 and 6).

Hutton, however, understood the verdicts quite differently. In papers filed with the Court on February 23, 1983

Hutton noted that the verdicts must be read in light of the parties stipulation that Hutton had established by a preponderance of the evidence all of the facts necessary to prove the amount of Arnebergh's deficiency in his commodity account was $336,614.11. Because the jury award in favor of Arnebergh and the jury award in favor of Hutton were each precisely one half of this amount (ignoring the 11 cents) Hutton argued that the jury intended for Arnebergh to pay one half of the deficiency in his account and for Hutton to absorb the other half of the deficiency.

The Court, after consultation with counsel, contacted the jury which had returned the verdicts and asked them to come in to Court to discuss the intended meaning of the verdicts returned on February 8, 1983. [The Court notes that

this was done over the objection of Arnebergh's counsel but in accordance with a procedure which had been stipulated to by the parties in the event the Court decided to call in the jury.] This conference was held on March 15, 1983. Copies of the transcript of the conference have been mailed to both parties. As reflected in the transcript, the Court suggested the two interpretations set out above to the jury and noted that other interpretations were conceivable. The Court then asked the jury to confer among themselves off the record and out of the presence of the Court to determine whether or not they had agreed on a meaning for the verdicts when they returned the verdicts on February 8, 1983. After a brief period, the jury indicated to the Court that they had all intended the verdicts to mean

that Arnebergh was to pay one half of his deficiency account to Hutton and that Hutton was to absorb the other half of the deficiency. The Court will enter judgment accordingly.

One issue remains to be resolved in this litigation: the question of who is to bear the attorneys' fees and costs. The Court expressly retains jurisdiction over this matter to resolve this issue. Arnebergh included an application for an award of attorneys' fees in his application for entry of judgment. However, no supporting documents - e.g., copies of contemporaneously kept time records, underlying fee agreements, etc. - have been submitted in support of this application. In order to resolve this issue, the Court orders as follows:

(1) Arnebergh is to submit on or before April 6, 1983 copies of the

documents supporting his application for attorneys' fees as well as any additional legal support for his position that he is entitled to an award of attorneys' fees and costs in this case. (If such a brief is filed, it should be complete in itself and should include those arguments raised in the application for attorneys' fees included in the application for entry of judgment. If no such brief is submitted, that portion of the application for entry of judgment which addresses the issue of attorneys' fees will be treated as Arnebergh's opening brief);

(2) Hutton is to file on or before April 15, 1983 its papers in opposition to Arnebergh's application for attorneys' fees and any application for attorneys' fees and/or costs which it wishes to make on its own behalf;

(3) Arnebergh is to file on or before April 20, 1983 his papers in reply;

(4) Oral argument of this matter will be heard on April 25, 1983;

(5, If either or both parties wish to file any other motions in these cases, such motions should be filed in a timely manner and noticed for hearing together with the hearing of the application(s) for attorneys' fees and costs on April 25, 1983.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: March 23, 1983.

_____

Malcolm M. Lucas
United States District Judge

FILED
FEB 8, 1983
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E. F. HUTTON & COMPANY, INC., etc. Plaintiff, v. ROGER ARNEBERGH, et al., Defendants.	No. CV-80-2273-MML CV-80-2721-MML SPECIAL VERDICT IN FAVOR OF ROGER ARNEBERGH
ROGER ARNEBERGH, Plaintiff, v. E. F. HUTTON & COMPANY, etc., Defendants.	

We, the jury in the above entitled matter, find the following Special Verdict on the issues submitted to us:

ISSUE NO. 1: Did E. F. Hutton & Co., Inc. (hereafter "E. F. Hutton"), Leonard Robbins and/or Robert Weinman breach an express contract with Roger Arnebergh in connection with the handling of the December 1980 silver futures contracts?

Answer "Yes" or "No" as to each defendant.

E.F. HUTTON		LEONARD ROBBINS	
X	Yes	_____	Yes
_____	No	X	No

ROBERT WEINMAN

X	Yes
_____	No

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within the scope of his authority or employment is, by law, an act of E. F. Hutton.

Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you find that Leonard Robbins and/or Robert Weinman were acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you base E. F. Hutton's liability upon the acts of officers or employees other than Leonard Robbins or Robert Weinman.

If you have answered Issue No. 1 "Yes" as to any defendant, then answer Issue No. 2. Otherwise continue with Issue No. 3.

ISSUE NO. 2: Was Roger Arnebergh damaged by any such breach of contract?

Answer "Yes" or "No".

ANSWER Yes

ISSUE NO. 3: Did E. F. Hutton, Leonard Robbins and/or Robert Weinman breach the implied covenant of good faith and fair dealing in connection with the handling of the December 1980 silver futures contracts or in connection with the handling of the April 1980 spot contracts?

Answer "Yes" or "No" as to each defendant.

E. F. HUTTON

X Yes (Futures)

X No (Spot)

LEONARD ROBBINS

_____ Yes

X No (Futures, Spot)

ROBERT WEINMAN

X Yes (Futures)

X No (Spot)

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within the scope of his authority or employment is, by law, an act of E. F. Hutton. Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you find that Leonard Robbins and/or Robert Weinman were acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you base E. F. Hutton's liability upon the acts of officers or employees other than Leonard Robbins or Robert Weinman.

If you have answered Issue No. 3 "Yes" as to any defendant then answer Issue No. 4. Otherwise continue with Issue No. 5.

ISSUE NO. 4: Was Roger Arnebergh damaged by any such breach of the implied duty of good faith and fair dealing?

Answer "Yes" or "No".

ANSWER Yes (Futures), No (Spot)

Continue with Issue No. 5.

ISSUE NO. 5: Did E. F. Hutton and/or Leonard Robbins act negligently?

Answer "Yes" or "No" as to each defendant.

E. F. HUTTON		LEONARD ROBBINS	
X	Yes	X	Yes
_____	No	_____	No

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within

the scope of his authority or employment is, by law, an act of E. F. Hutton. Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" as to Leonard Robbins unless you find that Leonard Robbins was acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins unless you base E. F. Hutton's liability upon the acts of officers or employees other than Leonard Robbins.

If you have answered Issue No. 5 "Yes" as to either or both defendants then answer Issue No. 6. Otherwise continue with Issue No. 7.

ISSUE NO. 6: Was Roger Arnebergh damaged by any such negligence?

Answer "Yes" or "No".

ANSWER YES

Continue with Issue No. 7.

ISSUE NO. 7: Insofar as Roger Arnebergh's claim for negligence is concerned, did Roger Arnebergh act negligently?

Answer "Yes" or "No".

ANSWER YES

If you have answered Issue No. 7 "Yes" then answer Issue No. 8. Otherwise continue with Issue No. 10.

ISSUE NO. 8: Did Roger Arnebergh's negligence contribute as a proximate cause to his injury?

Answer "Yes" or "No".

ANSWER YES

If you have answered Issue No. 8 "Yes", then answer Issue No. 9. Otherwise continue with Issue No. 10.

ISSUE NO. 9: Assuming that 100% represents the combined negligence of E.

F. Hutton and/or Leonard Robbins and Roger Arnebergh, what proportion of the combined negligence is attributable to Roger Arnebergh on the one hand and what proportion is attributable to E. F. Hutton and/or Leonard Robbins on the other?

Answer with two numbers adding up to 100.

Roger Arnebergh 50%

E. F. Hutton and/or Leonard Robbins 50%

Continue with Issue No. 10.

ISSUE NO. 10: Did E. F. Hutton, Leonard Robbins and/or Robert Weinman breach a fiduciary duty owed to Roger Arnebergh?

Answer "Yes" or "No" as to each defendant.

E. F. HUTTON	LEONARD ROBBINS
_____ Yes	_____ Yes

__X__ No __X__ No

ROBERT WEINMAN

_____ Yes

__X__ No

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within the scope of his authority or employment is, by law, an act of E. F. Hutton. Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" to Leonard Robbins and/or Robert Weinman unless you find that Leonard Robbins and/or Robert Weinman were acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you base E. F. Hutton's liability

upon the acts of officers or employees other than Leonard Robbins or Robert Weinman.

If you have answered Issue No. 10 "Yes" as to any defendant then answer Issue No. 11. Otherwise continue with Issue No. 12.

ISSUE NO. 11: Was Roger Arnebergh damaged by this breach of a fiduciary duty?

Answer "Yes" or "No".

ANSWER n/a

Continue with Issue No. 12.

ISSUE NO. 12: Did E. F. Hutton, Leonard Robbins and/or Robert Weinman violate any provision of the Commodity Exchange Act?

Answer "Yes" or "No" as to each defendant.

E. F. HUTTON	LEONARD ROBBINS
_____ Yes	_____ Yes

__X__ No __X__ No

ROBERT WEINMAN

_____ Yes

__X__ No

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within the scope of his authority or employment is, by law, an act of E. F. Hutton. Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you find that Leonard Robbins and/or Robert Weinman were acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you base E. F. Hutton's liability

upon the acts of officers or employees other than Leonard Robbins or Robert Weinman.

If you have answered Issue No. 12 "Yes" as to any defendant then answer Issue No. 13. Otherwise continue with Issue No. 14.

ISSUE NO. 13: Was Roger Arnebergh damaged by any such violation?

Answer "Yes" or "No".

ANSWER n/a

Continue with Issue No. 14.

ISSUE NO. 14: Did E. F. Hutton, Leonard Robbins and/or Robert Weinman "convert" Roger Arnebergh's property?

Answer "Yes" or "No" as to each defendant.

E. F. HUTTON		LEONARD ROBBINS	
X	Yes	_____	Yes
_____	No	X	No

ROBERT WEINMAN

__X__ Yes

_____ No

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within the scope of his authority or employment is, by law, an act of E. F. Hutton. Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you find that Leonard Robbins and/or Robert Weinman were acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you base E. F. Hutton's liability upon the acts of officers or employees

other than Leonard Robbins or Robert Weinman.

If you have answered Issue No. 14 "Yes", then answer Issue No. 15, otherwise continue with Issue No. 16.

ISSUE NO. 15: Was Roger Arnebergh damaged by any such conversion of his property?

Answer "Yes" or "No".

ANSWER Yes

Continue with Issue No. 16.

ISSUE NO. 16: Did E. F. Hutton, Leonard Robbins and/or Robert Weinman defraud Roger Arnebergh in connection with the purchase of the December futures contracts and/or the April spot contracts?

Answer "Yes" or "No" as to each defendant.

E. F. HUTTON	LEONARD ROBBINS
_____ Yes	_____ Yes

X	No	X	No

ROBERT WEINMAN

_____	Yes
X	No

NOTE: As indicated in the jury instructions, E. F. Hutton can only act through its officers and employees and any act or omission of an employee within the scope of his authority or employment is, by law, an act of E. F. Hutton. Thus, in answering this question, you must answer "Yes" with respect to E. F. Hutton if you answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you find that Leonard Robbins and/or Robert Weinman were acting outside of the scope of his authority or employment. Similarly, if you answer "Yes" as to E. F. Hutton, you must answer "Yes" as to Leonard Robbins and/or Robert Weinman unless you base E. F. Hutton's liability

upon the acts of officers or employees other than Leonard Robbins or Robert Weinma

If you have answered Issue No. 16 "Yes" as to any defendant, answer Issue No. 17. Otherwise continue with Issue No. 18.

ISSUE NO. 17: Was Roger Arnebergh damaged by any such fraud?

Answer "Yes" or "No".

ANSWER n/a

Continue with Issue No. 18.

ISSUE NO. 18: If you have answered any one or more of Issues No. 2 or 4 or 6 or 11 or 13 or 15 or 17 "Yes" then what is the total amount of damages suffered by Roger Arnebergh as a result?

NOTE: As indicated in the jury instructions, if the damages suffered by Roger Arnebergh were the result of the negligence of either E. F. Hutton or

Leonard Robbins and you have found Roger Arnebergh to have also been negligent (see Issues No. 7, 8 and 9) then any amount of damages suffered by Roger Arnebergh due to the negligence of either E. F. Hutton or Leonard Robbins must be reduced by a percentage equal to the percentage of Roger Arnebergh's own negligence in causing these damages.

ANSWER $ 168,307

Continue with Issue No. 19.

ISSUE NO. 19: If you have found that Roger Arnebergh was injured by any wrongful act of E. F. Hutton, should Roger Arnebergh recover interest on any damages suffered?

Answer "Yes" or "No".

ANSWER NO

Continue with Issue No. 20.

ISSUE NO. 20: If you have answered any one or more of Issues No. 5 or 10 or

14 or 16 "Yes" as to any defendant, is Roger Arnebergh entitled to recover punitive damages from that defendant? If applicable, answer "Yes" or "No" as to each defendant.

E. F. HUTTON	LEONARD ROBBINS
X Yes	_____ Yes
_____ No	X No

ROBERT WEINMAN

_____ Yes

X No

If you have answered Issue No. 20 "Yes" as to any defendant, then answer Issue No. 21. Otherwise continue with Issue No. 22.

ISSUE NO. 21: As to any defendant against whom Roger Arnebergh is entitled to punitive damages, what amount should Roger Arnebergh receive?

E. F. Hutton $ 100,000

Leonard Robbins $ -0-

Robert Weinman $ -0-

Continue with Issue No. 22.

ISSUE NO. 22: Did E. F. Hutton procure Roger Arnebergh's promissory note by fraud?

Answer "Yes" or "No".

ANSWER No

Continue with Issue No. 23.

ISSUE NO. 23: Did E. F. Hutton procure the trust deed to Roger Arnebergh's property by fraud?

Answer "Yes" or "No".

ANSWER Yes

Dated: February 8, 1983.

Foreperson

FILED
FEB 8, 1983
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E. F. HUTTON & COMPANY, INC., etc. Plaintiff, v. ROGER ARNEBERGH, et al., Defendants.	No. CV-80-2273-MML CV-80-2721-MML VERDICT IN FAVOR OF E. F. HUTTON & COMPANY, INC.
ROGER ARNEBERGH, Plaintiff, v. E. F. HUTTON & COMPANY, etc., Defendants.	

We the jury find in favor of E. F. Hutton & Company, Inc. and against Roger Arnebergh in the amount of $168,307.

Dated February 8, 1983.

_____
Foreperson

FILED
JUL 29, 1983
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E. F. HUTTON & COMPANY, INC., etc. Plaintiff, v. ROGER ARNEBERGH, et al., Defendants.	No. CV-80-2273-MML CV-80-2721-MML ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL AND DENYING MOTION TO ALTER OR AMEND THE JUDGMENT OR FOR NEW TRIAL OF CV-80-2273-MML
ROGER ARNEBERGH, Plaintiff, v. E. F. HUTTON & COMPANY, etc., Defendants.	

E. F. Hutton & Co., Inc. ("Hutton") has moved for Judgment Notwithstanding the Verdict and has joined with Leonard Robbins (Robbins) and Robert Weinman

(Weinman) in moving, in the alternative, for a new trial of these consolidated cases. Roger Arnebergh (Arnebergh) has moved to alter or amend the judgment, or, in the alternative, for a new trial of one of the consolidated cases, CV-80-2273-MML. Both motions came on for hearing before the court, the Honorable Malcolm M. Lucas, District Judge, presiding, on April 25, 1983. After careful consideration of the papers filed and of the oral argument of counsel the Court denies both motions.

These consolidated actions were tried to a jury in an eight day trial. The jury returned general and special verdicts on February 8, 1983. Judgment on the verdicts was entered on March 25, 1983. The jury awarded both compensatory and punitive damages in favor of Arnebergh and against Hutton. The jury

also awarded compensatory damages in favor of Hutton and against Arnebergh.

Hutton seeks judgment notwithstanding the verdict as to the award of punitive damages against it on the grounds that such an award is not supported by sufficient evidence. The standard for deciding a motion for judgment notwithstanding the verdict is precisely the same as the standard for deciding a motion for a directed verdict. Quichocho v. Kelvinator Corp., 546 F.2d 812 (9th Cir. 1976). Such motions should be granted only in the exceptional case where the evidence presented "was such that the court could say that as a matter of law the evidence was capable of only one interpretation and that in favor of [the moving party]." United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356 (9th Cir. 1977). Hutton

contends that even under this standard the evidence was not sufficient to support an award of punitive damages. Hutton also appears to argue that this award was contrary to law in that "a substantial portion of Arnebergh's claim arose from contract." The Court rejects both arguments. It is true that this litigation involved claims for breach of contract and that punitive damages may not be awarded for breach of a duty arising from contract. Cal.Civ.Code §3294. However, the jury also found Hutton liable in tort. Punitive damages may be awarded for tortious conduct if there is evidence that the defendant was guilty of oppression, fraud, or malice. Cal.Civ.Code §3294. The Court cannot conclude that the evidence presented at trial was such that, as a matter of law, the evidence was capable of only one

interpretation in this regard, and that in favor of Hutton. Thus, Hutton is not entitled to judgment notwithstanding the verdict.*

Hutton also joins with Robbins and Weinman in moving for a new trial. They raise four arguments in support of this motion:

(1) the court erred in instructing the jury on the theory of implied covenant of good faith and fair dealing;

---

* Hutton also suggests that a finding of malice, fraud or oppression is not consistent with certain responses given by the jury to issues Nos. 16 and 19 presented to the jury with the special verdict. This argument is without merit. The jury's finding in favor of Hutton on the fraud claim for relief (issue 16) is not inconsistent with an award of punitive damages under one of the other tort claims on which the jury found in favor of Arnebergh. The decision not to award pre-judgment interest (issue 19) was within the jury's discretion and is, therefore, not inconsistent with an award of punitive damages.

(2) the court erred in instructing the jury on punitive damages;

(3) the award of punitive damages is against the weight of the evidence; and

(4) the verdicts are inconsistent and were reached by compromise.

In support of the first argument, the moving parties argue that, under the facts of this case, there can be no claim for the breach of an implied covenant of good faith and fair dealing. Although there is some question as to the scope of a claim for the breach of the implied covenant of good faith and fair dealing under California law, the Court is aware of no authority, and moving parties cite none, which holds that such a claim cannot be raised in the context such as that presented by this case. This argument does not present adequate

grounds for the Court to exercise its discretion to order a new trial.

In support of the second argument, the moving parties simply make reference to the arguments made in support of Hutton's motion for judgment notwithstanding the verdict. For the reasons stated above in discussing that aspect of the motion the Court rejects this argument.

The moving parties also argue that the award of punitive damages is against the weight of the evidence at trial. They note correctly that even if judgment notwithstanding the verdict cannot be granted, the Court may in its discretion, order a new trial if the verdict is contrary to the weight of the evidence. The Court, having weighed the evidence presented at trial, and in the exercise of its discretion, concludes that there

is insufficient reason to order a new trial based on the award of punitive damages.

Finally, the moving parties argue that the jury verdicts are inconsistent and that they were reached by compromise. None of the inconsistencies suggested by the moving parties are irreconcilable. The jury could have found "oppression, fraud or malice" and thus awarded punitive damages (issue 20) without exercising its discretion to award interest on the damages (issue 19) or finding for Arnebergh on the fraud claim (issue 16). Similarly, the jury could have found that the trust deed was procured by fraud (issue 23) although the promissory note was not (issue 22). As Arnebergh notes in his opposition to the present motion, the representations made with respect to the trust deed were made

two weeks after, and under different circumstances than the representations made with respect to the promissory note. Finally, the Court finds insufficient indication that the verdicts were reached by compromise to warrant a new trial of these actions.

Thus, Hutton's motion must be denied.

The Court turns now to Arnebergh's motion for an order altering or amending the judgment or, in the alternative, for a new trial of CV-82-2273-MML. Arnebergh first argues that the judgment entered does not conform with the verdicts returned by the jury. Arnebergh contends that the Court erred in entering judgment in favor of Hutton in the amount of $336,614.11 and in his favor in the amount of $168,307. He contends that judgment should have been entered in

Hutton's favor in the amount of $168,307 and in his favor in the same amount. Phrasing this objection in other language elsewhere in the papers, Arnebergh argues that the Court erred in "increasing" or "doubling" the damages awarded to Hutton.

As is discussed fully in the Court's "Order re Entry of Judgment" filed on March 23, 1983 and entered on March 25, 1983, Arnebergh's contentions in this regard run contrary to the jury's understanding of its own verdicts. The jury intended the effect of its verdicts to be that, insofar as compensatory damages were concerned, Hutton would receive $168,307 from Arnebergh in payment of Hutton's claims against Arnebergh and that Hutton would lose any right to recover the balance of the $336,614.11 owed by Arnebergh to Hutton in satisfaction of Arnebergh's claims

against Hutton. As Hutton correctly notes this result could have been achieved either by entering judgment in favor or Arnebergh in the amount of $168,307 and in favor of Hutton in the amount of $336,614.11 (as the Court did) or by entering judgment in favor of Arnebergh in the amount of $0 and in favor of Hutton in the amount of $168,307. The Court chose the former method as more accurately reflecting the jury's intent. There is absolutely no support for Arnebergh's contention that judgment should have been entered in favor of Hutton and in favor of Arnebergh in the same amount, i.e., $168,307.

Arnebergh also argues that the verdicts returned can, in fact, be separated into independent verdicts on the two consolidated cases involved in this litigation. He then argues that a

new trial of one of the actions, CV-82-2273-MML, is warranted. This argument is without merit. The claims raised in this litigation were consistently and correctly treated as if this had been a single action. There was never any attempt to treat the two cases as separate and independent or any indication that the jury's verdicts were intended to be understood in the manner suggested by Arnebergh. Arnebergh's argument that, insofar as the judgment awards damages in his favor, it should be treated as a judgment on the one action (and should not be disturbed) and that, insofar as the judgment awards damages in favor of Hutton, it should be treated as a judgment on the other action (and should be altered or set aside pending a new trial) is totally spurious.

Finally, Arnebergh argues that the Court acted improperly in questioning the jurors after they returned their verdicts in an effort to understand the intended meaning of the verdicts. The Court carefully considered the propriety of this procedure--as well as Arnebergh's objections to it--prior to questioning the jurors. The Court concluded at that time that the procedure was proper. Arnebergh's papers provide no grounds for reconsideration of this decision.

Thus, Arnebergh's motion must be denied.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated July 29, 1983

Malcolm M. Lucas
United States District
Judge